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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 228.

LUTHER CLAY SLAVENS, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF APPELLANT.

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NOTE.—This case, by consent of counsel and order of court, is to be heard with the case of Wesley E. Travis *vs.* the United States, No. 84, October term, 1904. The question of law involved in that case, namely, the right of the Postmaster General to arbitrarily terminate, during its term, a contract for transportation of the United States mails, under a covered regulation wagon mail messenger, transfer, and mail station service, being, also, the main question of law involved in this case, it will not be necessary to reargue that question in this brief. The brief and argument, in that respect, in said other case will, therefore, be relied on the same as if repeated herein.

STATEMENT OF CASE.

The *facts* in this case, as found by the court below, are, in substance, as follows:

1. In pursuance of advertisement for proposals, in that behalf, for transporting the mails under the "covered regu-

lation wagon mail messenger, transfer, and mail station service," appellant entered into contracts with the United States covering mail service of said kind, at the places, for the periods, and at the compensation following:

(*a.*) City of Boston, Mass.; July 1, 1893, to June 30, 1897, inclusive; $49,516 per annum (*R.*, *41–2*).
(*b.*) City of Brooklyn, N. Y.; July 1, 1893, to June 30, 1897; $18,934 per annum (*R.*, *44*).
(*c.*) City of Omaha, Neb.; July 1, 1894, to June 30, 1898; $3,780 per annum (*R.*, *48*).

2. During the term of the BOSTON contract (*a*) appellee determined to dispatch certain of the mails embraced in the contract upon an electric street car line, West End Street Railway Co., and it thereby *decreased* the quantity and volume of the contract service.

Appellant was offered the privilege of continuing, under his contract, the performance of the service thus decreased, at a reduction from the contract rate; which he declined. Thereupon, on February 1, 1896, appellee undertook to arbitrarily terminate and discontinue the contract, for the reason above stated, and not because of any neglect or default on the part of the contractor, but under the alleged authority of the contract itself in that regard; and it, accordingly, relet the *same service*, under the same route, as so *decreased*, to another mail contractor for the remainder of said contract period, namely, from February 1, 1896, to June 30, 1897, inclusive, a period of seventeen months, at a compensation of $37,000 per annum; and the service was, thereafter, and during said remaining contract period, continuously performed by such other contractor; against all of which, appellant protested and objected, without avail (*R.*, *42–3*).

There was, however, no discontinuance of the service in carrying the mails on said route (*R.*, *43*).

3. The difference between the contract price thereof and the amount it would have cost appellant to perform the service, during said remaining seventeen months of the contract term, is the sum of $18,884.14 (*R.*, *43*).

4. The service embraced in said BOSTON contract required appellant to carry the mails—

> "between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, and between the several railroad stations, steamboat landings, and mail stations, now established, or that may hereafter be established,"

as prescribed in the advertisement and contract; as well any and all new or additional service of the like kind, that might be ordered during the contract term (*R.*, *14*).

During the performance of service under that contract, appellant was required to perform the following service, alleged by him to have been *extra* and not embraced within the contract, and for which he claims compensation, as follows:

(*a.*) Carrying the mails between the mailing-room and basement of the general post-office, in said city of Boston, and the stopping place of a street car line, West End Street Railway Company, from May 1, 1895, to February 1, 1896; said service requiring appellant to employ two wagons, two horses, two drivers, and sometimes an extra wagon. The value of said alleged *extra* service, so performed by appellant, and for which he received no compensation, is $274.55 (*R.*, *42*).

(*b.*) Carrying the mails both ways, between the Back Bay post-office, Boston, and the Brookline post-office, a distance of 2¼ to 3 miles; said service being admittedly *not* embraced within the terms of the contract. Appellant protested to the postmaster at Boston against the requirement to perform this service, but, as found by the court below, did not so

protest to the Postmaster General, nor to any officer of his department, until August 14, 1894; whereupon, the Postmaster General relieved appellant of the requirement, and entered into contract with another to perform that service, and payment therefor was thereafter made to said other contractor. The value of the *extra* service so performed by appellant, and for which he received no compensation, is $462.50 (*R.*, *42*).

Both of the items of claim, (*a*) and (*b*), were disallowed by the court below, (*a*) because, in the opinion of said court, not an *extra* service; and (*b*) because, as stated in said opinion, the service was performed without the knowledge or request of any one having defendant's authority, (*R.*, *50–51*).

5. During the term of the BROOKLYN contract (*b*), appellee, likewise, determined to dispatch certain of the mails embraced in the contract upon an electric street car line, Brooklyn Heights railroad; and it thereby *decreased* the quantity and volume of the contract service.

Thereupon, on March 1, 1896, appellee undertook to arbitrarily terminate and discontinue the contract, for the reason above stated, and not because of any neglect or default on the part of the contractor, but under the alleged authority of the contract itself, in that regard; and it, accordingly, re-let the same service, under the same route, as so *decreased*, to another mail contractor, for the remainder of said contract period, namely, from March 1, 1896, to June 30, 1897, inclusive, a period of sixteen months, at a compensation of $9,720 per annum, (*R.*, *42–8*); and the service was, thereafter, and during said remaining contract period, continuously performed by such other contractor; against all of which appellant protested and objected, without avail (*R.*, *48*).

There was, however, no discontinuance of the service in carrying the mails on said route. In this case, the action of the Postmaster General, in so terminating the contract, was the first and only notice to appellant, presumably because

in the case of the prior action, in respect of the Boston contract, appellant had declined to submit to a reduction from the contract rate, (*R.*, *47–8*).

6. While evidence was introduced by appellant, showing a damage, (loss of profits), sustained by him by reason of the breach of this contract by the government, the court below omitted and declined to find any amount of loss thereby sustained by appellant.

7. The service embraced in said BROOKLYN contract required appellant to carry the mails—

> "between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, and between the several railroad stations, steamboat landings, and mail stations, now established, or that may hereafter be established,"

as prescribed in the advertisement and contract; as well any and all new or additional service of the like kind, that might be ordered during the contract term (*R.*, *14*).

During the performance of service under that contract, the Postmaster General established mail service on a street car line, Brooklyn Heights railroad (being railway routes Nos. 207,805 and 207,807); and it, thereupon, required the contractor to perform service between the Brooklyn general city post-office and the mail route so established on the street car line, and between said mail route and the mail stations (*R.*, *44*).

The performance of this service required the contractor to deliver and receive mail dispatches to and from the street cars of said railroad at street crossings; the same, however, being, as contended by him, service of an entirely different kind from anything embraced within the contract.

The details of said *extra* service are set forth, in detail, in the petition, items (*a*) to (*i*), inclusive, (*R.*, *6–7*); and in like lettered items in the findings of fact, (*R.*, *44–47*).

The aggregate value of said several items of alleged *extra* service so performed by appellant, and for which he received no compensation, is $2,266.51 (*R.*, *47*).

The court below, however, rejected said claim for compensation, because, in its opinion, the service was properly required, under the terms of the contract, and, therefore, was not an *extra* service (*R.*, *51*).

8. The service embraced in said OMAHA contract required appellant to carry the mails as specified in the extracts from the contracts quoted in the above paragraphs 4 and 7, and the same, therefore, need not be here repeated.

During the performance of service under that contract, appellant was required to perform the certain alleged *extra* service set forth, in detail, in the petition, items (*a*) to (*d*), inclusive, (*R.*, *8*;) the same consisting in the delivery and receipt of mail dispatches, to and from street cars of the Omaha street railway, at street crossings; and being, as contended by appellant, service of an entirely different kind from anything embraced within the contract (*R.*, *48–9*).

The court below, however, omitted and declined to find any value in connection with said service, holding the same to have been "a mere substitution of another manner of per-" forming the same service contracted for and at an advan-" tage to the claimant, and was otherwise properly required " under paragraph 2 of the advertisement and provisions of " the contract, and the tenth section of the same" (*R.*, *49*).

9. Upon the foregoing facts, set forth in the findings of fact with greater detail, and further detailed and explained in the advertisement, instruction to bidders, and contracts, (hereinafter more particularly referred to,) the lower court decided, as matter of law, that claimant could not recover under any or either of the claims aforesaid; and, accordingly, entered judgment, dismissing his petition, (*R.*, *49*).

10. From that judgment, the present appeal was taken.

BRIEF.

ASSIGNMENT OF ERRORS.

The court below *erred:*

1. In holding that the Postmaster General had, under the facts found, the right to terminate and discontinue the Boston and Brooklyn contracts, respectively.

2. In failing to enter judgment for appellant for the amount of loss sustained by him by reason of the breach by appellee of each of said two contracts.

3. In holding that appellant cannot recover for the *extra* service required of him outside of the (city) limits of the Boston contract.

4. In holding that the service required of appellant, to and from street cars at street crossings, under the Boston, Brooklyn, and Omaha contracts, respectively, is not an *extra* service; and that appellant cannot recover therefor.

5. In failing to find the value of the service to and from street cars, so required of appellant in Omaha.

6. In failing to enter judgment for appellant for the value of each and every of the items of *extra* service aforesaid (3, 4, and 5).

7. In dismissing the petition of appellant, and entering judgment in favor of appellee.

The aggregate value of said several items of alleged *extra* service so performed by appellant, and for which he received no compensation, is $2,266.51 (R. 47).

IV. From that judgment, the present appeal was taken.

BRIEF.

The questions of law involved in this appeal may be conveniently considered and classified, as follows:

1. The right and authority, claimed and exercised by the Postmaster General, to arbitrarily terminate and discontinue the Boston and Brooklyn contracts, during the term of each thereof; such action being based upon the authority alleged to be contained in the contracts themselves, and asserted because the quantity and volume of contract service had been voluntarily decreased by the Postmaster General; but not, however, because of any breach of contract, neglect, or default on the part of the contractor; such action resulting in loss to appellant; and

2. The right of appellant to compensation for alleged *extra* services imposed upon and required of him under each of the three certain contracts, above referred to.

These propositions will be considered and discussed in the order stated.

I.

NO RIGHT IS RESERVED TO THE POSTMASTER GENERAL, UNDER EITHER OF THE CONTRACTS, TO TERMINATE OR DISCONTINUE THE SAME DURING THE CONTRACT TERM, BECAUSE OF A DECREASE IN QUANTITY AND VOLUME OF THE CONTRACT SERVICE.

Before considering the provisions of the Boston and Brooklyn contracts, bearing upon the proposition just stated, it may be useful to fix in mind the principles of law applicable in a case like the present, and which may be thus summarized:

(*a.*)

THE CONTRACT PROVISIONS ARE TO BE TESTED AND APPLIED BY THE SAME RULES OF LAW, AND GOVERNED BY THE SAME DECISIONS, AS IF ENTERED INTO BETWEEN INDIVIDUALS.

This proposition is carefully considered, and the authorities cited, in appellant's brief in the Travis case, (hereinabove referred to), and the attention of the court is accordingly asked thereto, (*pp. 3–5*).

The two contracts here under review were entered into in pursuance of lawful authority, and the only question involved is as to the relative rights of the contracting parties, as found in the contracts themselves, or in the law governing them—the relation between the parties being that of perfect equality in right. It, therefore, becomes important to ascertain the exact rights of each party, as fixed by the contracts.

(*b.*)

PROVISIONS OF THE BOSTON AND BROOKLYN CONTRACTS.

As has been shown, the Postmaster General undertook to terminate and discontinue, not the service, but the contracts of appellant for carrying the mails in the cities of Boston and Brooklyn, during the term of such contracts, respectively. In the Boston contract, seventeen months then remained of the contract term; and, in the Brooklyn contract, sixteen months.

It also, appears that the discontinuance was not made, in either case, on account of any breach of contract, neglect, or default on the part of appellant, in the performance of contract.

The quantity and volume of contract service had become, in each case, *decreased*, by the voluntary action of the Postmaster General in establishing a mail messenger service upon

an electric street car line, and certain of the mail dispatches, embraced within the contract service, were accordingly, thereafter, carried upon the street cars instead of in wagons of appellant; and this, in part, and to that extent, reduced and decreased the quantity and volume of the contract service.

In this situation of fact, the Postmaster General first offered appellant the alternative of an abatement (of $10,000) from his annual compensation under the Boston contract, or having the contract terminated and discontinued. Appellant insisted upon his contract rights, and declined to submit to the suggested abatement; and the order to discontinue promptly followed (*R., 42–3*).

In the Brooklyn contract, a summary order to discontinue was issued by the Postmaster General, without opportunity afforded appellant to elect, as above; presumably because he had insisted upon strict recognition of his contract rights in said other case, (*R., 47–8*).

In this discussion, it will not be necessary to examine each of said two contracts, inasmuch as they are precisely alike, so far as the question now under consideration is concerned, each containing the same conditions and limitations, and only differing in respect of dates, place of performance, and amount of compensation. Counsel will, therefore, refer to but one of said contracts, and the advertisement for proposals and instructions to bidders in connection therewith, namely the Boston contract, (Exhibit "A," *R., 10–18*; Exhibit "B," *R., 19–23*).

The following paragraphs are contained in the instructions to bidders:

> "2. The contractors under this advertisement will be required to perform, *without additional compensation, any and all new or additional service that may be ordered from July 1, 1893, or at any time thereafter during the contract term*, whether between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, or between the several railroad stations, steamboat

landings, and mail stations, now established or that may hereafter be established, whether caused by the establishment of new or by change of site of existing post-offices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary for any other reason. Bids must be made with this distinct understanding, and must name the amount per annum for the whole service, and not by the trip.

"3. There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay.

"4. The Postmaster General may annul a contract for repeated failures," etc. (not here material) (*R.*, *14–15*).

The contract entered into with appellant, under said advertisement for proposals and instructions to bidders, required him to transport

> "the mails on route No. 204001, being the covered regulation wagon mail messenger, transfer, and mail station service at the city of Boston, Mass. * * * and all new or additional service of said kinds which may at any time during the term of this contract be required in said city, at $49,516. per year, for and during the term beginning the first day of July, 1893, and ending June 30, 1897" (*R.*, *19*).

The contract contained the following, further, provisions:

> "*Tenth.* To perform all new or additional or changed covered screen wagon mail station service that the Postmaster General may order at the city of Boston, Mass., during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the estab-

lishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service.

* * * * * * *

"It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity.

* * * * * * *

"And it is further stipulated and agreed, that the Postmaster General may annul this contract for repeated failures," etc. (not here material).

* * * * * * *

"And this contract is further to be subject to all the conditions imposed by law, and the several acts of Congress relating to post-offices and post-roads" (*R., 21–2*).

The foregoing sufficiently indicates the contract provisions, so far as the same have any proper application to the facts here under review.

As above shown, the contract absolutely bound the contractor to perform, without additional compensation, all such new, additional, or changed, increased or extended, service as might be required of him during the contract term; and, on the other hand, it bound the United States to pay to the contractor the agreed rate of compensation, even should the service be decreased during the contract term.

Thus, according to the very letter of the contract, both parties were placed on an equal footing, and each took the risk and chance of a change in the amount of service required, be it an increase or a decrease, during the entire term, without any change in the amount of compensation to be paid by the one and received by the other.

The wording of the contract is so exceedingly plain and free from all ambiguity that it would hardly seem to admit of serious argument in support of a contention so utterly in defiance of and in direct conflict with its said provisions, as one that seeks to impose upon the contractor the obligation to perform the service, even if increased or extended, without additional compensation; and yet permits the United States to break the contract because the volume of service happens to be decreased, and some other contractor is willing to perform the decreased service at a lower price.

(*c.*)

THE ACTION OF THE POSTMASTER GENERAL IN THIS CASE CONSTITUTED A BREACH OF SAID TWO CONTRACTS WITH APPELLANT; AND THE CONTENTIONS URGED IN DEFENSE ARE UNTENABLE IN LAW.

If appellee saw fit, during the contract term, to *decrease* the amount of service required, whether by the curtailment or partial discontinuance thereof, or by adopting, for a part of the service, some other kind of a mail messenger—for example, an electric street railway line—that was its privilege; but, as the contract expressly stipulated that such decrease in amount of service required should not change or reduce his pay, the contractor was entitled to all benefit and profits, if any, that would result from such decrease in the service required.

The appellant had a right to rely upon the terms and provisions of the contract, according to the natural and

ordinary meaning of the words used; and he had a right to assume that the covenant to pay a fixed rate of compensation per annum, for the contract period, unaffected by either an increase or decrease in quantity and volume of service required, was equally binding upon the government as upon himself, and that that covenant to pay meant just exactly what it said, nothing more and nothing less.

The government, however, here seeks to create and impose a new contract upon appellant, after breach on its part, by seeking to inject into the contract an extraordinary condition that not only finds no support from anything contained in the contract, but one that is absolutely inconsistent with and repugnant to the contract.

(*d.*)

THE SERVICE EMBRACED IN THE CONTRACT IS A COVERED REGULATION WAGON MAIL MESSENGER, TRANSFER, AND MAIL STATION SERVICE IN A CITY.

It must be borne in mind that the service embraced in each of said two contracts is "a covered regulation wagon "mail messenger, transfer, and mail station service" in a city, such service being based, not upon number of trips or mileage, but upon a fixed annual rate of compensation for the *whole* service, unaffected by either additions to or curtailment of the contract service:

> "Bids must be made with this distinct understanding, and must name the amount per annum for the *whole service*, and not by the trip" (Instructions to bidders, *R.*, *14*).

This, therefore, is radically and distinctly different from a railroad, steamboat, or star-route service, which latter is readily placed and estimated upon a mileage basis, with an increase of compensation for an increase in service, (section

813, Postal Laws and Regulations;) and a decrease of compensation for a decrease in service, (section 817, *id.;*) the change of compensation, in either case, increase or decrease, to be prorated, *i. e.*, the exact proportion which the original compensation bears to the original service.

The government, however, in order to justify its action, undertakes to ignore the contract provisions, and to maintain that the right to "discontinue the entire service" is the legal equivalent of the right "to discontinue the contract;" and, furthermore, that said section 817, (*supra*,) in any event, would confer that right in order to place on the route a superior service.

The court below, however, found that there was, in fact, no discontinuance of service in carrying mails on the route, (*R., 43, 47;*) hence, the action cannot be justified upon that hypothesis.

That section 817, (*supra*,) relating to an entirely different kind of mail service (railroad, steamboat, and star-route,) furnishes no justification for the action complained of, is equally apparent.

Sections 808, 813, and 817, of said Postal Laws and Regulations, have been set forth, at length, in said brief in the Travis case, (pp. 14-15,) and the attention thereto of the court is asked, without here repeating the same.

Without repeating the argument and citation of authorities so set forth in said brief in the other case, but by reference, adopting the same on behalf of the appellant in this case; it is submitted that the judgment of the court below, in respect of the action of the Postmaster General in so terminating and discontinuing the Boston and Brooklyn contracts, during the contract term of each thereof, was erroneous in law; and that appellant should be adjudged to recover the loss sustained by him by reason of said breach of contract.

II.

APPELLANT IS ENTITLED TO RECOVER THE VALUE OF THE EXTRA SERVICES REQUIRED OF HIM, AND WHICH WERE NOT EMBRACED WITHIN THE CONTRACTS.

The claim of appellant for *extra* compensation may be divided into two classes; one, service required, under the Boston contract between the Back Bay post-office, (in the city of Boston), and the post-office at Brookline, (the latter being outside of the city limits of Boston); and, the other, service in delivering and receiving mail dispatches to and from the street cars, of a street railway line, at street crossings, under each of the three contracts, Boston, Brooklyn, and Omaha.

Considering the claims in the order stated:

(*a.*)

EXTRA SERVICE BETWEEN THE BACK BAY (BOSTON) AND BROOKLINE POST-OFFICES.

During a part of the contract term, appellant was required to carry the mails between the Back Bay post-office (Boston), and the Brookline post office, a distance of 2½ to 3 miles, the latter office being outside of the city limits of Boston, and in an independent town, and which service was admittedly *not* embraced within the contract.

He performed the service, (under protest made to the city postmaster at Boston), from February 12, 1894, to August 14, 1894, when, upon complaint by appellant to the Postmaster General, the latter ordered its discontinuance, and entered into contract to have the service performed by another person, and made payment for the service so thereafter performed by said other person. The value of the *extra* service so performed by appellant, as found by the

court below, and for which he received no compensation, is $462.50 (*R., 42*).

The court below, in its majority opinion, thus disposed of the claim, (*R., 10*):

> "As the service was performed without the knowledge or request of anyone having defendant's authority, this item, it is plain, cannot be allowed, and it will be dismissed from the case without further notice" (Whitsell *vs.* United States, *34 C. Cls. R., 5*).

The Whitsell case, however, does not support the holding. In that case, a mail contractor had been relieved of a substantial part of his route, and a certain other route given him, in lieu thereof, by the local postmaster. He performed the changed service without objection or protest, during the entire contract period of six years. After the contract had been fully performed, he brought suit in the Court of Claims, to recover for the alleged extra service. That court, under the facts referred to, held that by his silence, claimant construed his own action, and thereby made known his real intention, and that he could not afterwards be heard to deny it. The court did not, however, undertake, in that case, to hold that no recovery could be had in any case where the service had been ordered by a postmaster instead of by the Postmaster General.

What it held, is thus stated in the opinion:

> "It is true that the government received the benefit of the service rendered by the claimant, and if the same had been performed under circumstances indicating a purpose on the part of the claimant to seek compensation therefor, the court might be authorized to imply a contract therefor and permit a recovery for the *quantum meruit*" (*34 C. Cls., 10*).

The law properly applicable to the claim is, it is submitted, accurately stated in the dissenting opinion below, in this case, of Nott, Ch. J.:

"It is well settled that where a contract provides that additional work or service or material may be ordered only by a designated officer, such as the head of a department, a subordinate cannot bind the defendants by directing the contractor to do additional work, even though the defendants receive a benefit therefrom. * * * But it is equally well settled that when service is rendered to the government, which it needs, and is invited by an officer having charge of such work, an implied contract will arise and the claimant will recover *in quantum meruit*, (Clark *v.* United States, *95 U. S., 539*).

* * * * * * *

"The postmaster, supposing that Brookline was within the territory of the contractor, and that the additional service would be performed without additional compensation, ordered the contractor to do it by wagon service. He complied, but appealed to the Postmaster General, setting forth that the service was beyond his territory. The Postmaster General called on the postmaster for explanations and investigated the facts; he then approved the service and thereby ratified what had been done, and directed the postmaster to take measures for its unbroken continuance and for permanently carrying it on. When these arrangements had been made he relieved the contractor from performing. The case, therefore, is precisely like that of Otis (*120 U. S. R., 115, 121, 123*) where, under a similar contract, the postmaster in New York required the contractor to carry mails beyond his territorial field, viz., from New York to Jersey City, and where the Supreme Court held that this was *extra* service for which the contractor was entitled to recover" (*R., 53–4*).

It is, therefore, submitted that an allowance should have been made to appellant in respect of this item; and that the lower court erred, in matter of law, in rejecting it.

(*b.*)

EXTRA SERVICE IN DELIVERING AND RECEIVING MAIL DISPATCHES, TO AND FROM THE STREET CARS OF A STREET RAILWAY LINE, AT STREET CROSSINGS, UNDER EACH OF THE THREE CONTRACTS, BOSTON, BROOKLYN, AND OMAHA.

As above shown, appellant had three (3) separate contracts, covering the "covered regulation wagon mail messenger, transfer, and mail station service," at and in the cities of Boston, Brooklyn, and Omaha, respectively. So far as the question of this *extra* service is concerned, the contracts are identical, and, hence, it will not be necessary to separately consider the provisions of the several contracts.

This service, as stated in the advertisement and instructions to bidders was required to be performed—

> "between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, and between the several railroad stations, steamboat landings, and mail stations, now established, or that may hereafter be established,"

as therein prescribed; as well, also, any and all new or additional service of said kinds that might be ordered during the term of the contract (*R., 14*).

These requirements, set forth in the advertisement, were carried into the contract and made part thereof (*R., 19*), which contract specified that claimant should "take the mail from and deliver it into the post-offices, mail stations, and cars at such points and at such hours, under the direction of the postmaster at * * *, approved by the Postmaster General, as will secure dispatches and connections and facilitate distribution;" that he should furnish sufficient wagons "for the prompt and proper performance of the service" (*R., 20*), and, further, that he should "per-

form all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster General may order * * * during the contract term, without additional compensation, whether caused by change of location of post-offices, stations, landings, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster General may require as a part of such new or additional service" (*R., 21*).

It is important to bear in mind the distinction between "new or additional service," which appellant contracted to perform without additional compensation; and "extra" service, which he did not contract to perform without additional compensation.

In the case of Otis, (*20 C. Cls., 315, 326,*) the lower court, in construing a mail contract similar to those here under consideration, held:

> "The 'new' service contemplated was service similar in its nature to that embraced in the general intent of the contract, such as that becoming necessary through the establishment of a new railroad station or steamboat landing in New York, while 'additional' service was to be an increase of the service which the contract as a whole contemplated, not an increase of an exceptional service which more properly might form part of another instrument."

That case was affirmed, on appeal, by this court (*120 U. S., 115*).

Speaking of said decision in the Otis case (*supra*), the dissenting opinion below, in this case, stated:

> "Mr. Justice Davis, in the case of Otis, * * * laid down as the rule of construction for these mail messenger contracts of the post-office that the 'new or additional mail messenger or transfer service'

> which is to be performed 'without additional compensation' must be construed to mean service similar in nature to that required by the contract. He also held that a contract prepared at the post-office leaving the contractor no choice as to form or phraseology must be construed in a doubtful case in favor of justice and against the Government. A more sound and just rule of construction was never laid down by a judge. The case was carried to the Supreme Court and affirmed" (*R., 52–3*).

And in the case of the Union Transfer Co. (*36 C. Cls., 216, 227*) said lower court again defined the expression in a like mail contract case as follows:

> "New or additional service must be such service as only increases the *volume* of the service specified in the contract."

And again, in the latest decision of said lower court, upon the same subject, in the case of Utah, Nevada, and California Stage Co. (decided April 25, 1904, but not yet reported), wherein it was held:

> "It must, therefore, be regarded as the settled rule of decision of this court that the 'new or additional 'mail messenger or transfer service' which is to be performed 'without additional compensation' is one thing, and that service which is different in kind and character is another; and that for the former the contractor cannot recover, but for the latter he may.
>
> * * * * * *
>
> "Accordingly, it has also been held that the department might multiply the number of branch post-offices and stations and increase the wagon trips to and from the railroads and between the general post-office and the branch post-offices and stations, but could not bring into the contract a new subject-matter and compel the contractor to render without compensation a service which he had not contracted to perform."

Having thus established that there is a well defined and recognized legal distinction, in such mail contracts, between "new or additional" service, and service which is of different kind and character, namely, "extra," let us consider the distinguishing facts in this case:

The contracts contemplated a wagon mail messenger, transfer, and mail station service, in a city, between the post-offices, railroad stations, steamboat landings, and mail stations, and between each thereof.

The system of carrying mails on the street car lines did not exist when the contracts were made; in fact, the carrying of mails by street railway lines is so essentially different that, since July 1, 1896, it has been officially designated and classified as "street railway service," as distinguished from other railroad service.

During the term of these contracts, the Postmaster General, in order to provide each of the cities, (Boston, Brooklyn, and Omaha,) with improved mail facilities, established a mail service on the street car lines; and, thereupon and thereafter, required the contractor to perform service between the post-office and the mail route so established on the street car lines, and between the latter and the mail stations (*R., 42, 44–46, 48–49*).

The performance of this service required the contractor to meet the street cars at a mere stopping place at a street crossing, (which was neither a post-office, branch post-office, railroad station, steamboat landing, or a mail station,) and there await the arrival of the street cars, and to make and receive deliveries of mail to and from such street cars.

In short, the Postmaster General having employed and designated a street railway line as a mail messenger, proceeded, in furtherance of such *new system* of carrying the mails, to require the contractor to supply a necessary and connecting link in the chain of such radically different form and kind of mail service, namely, to make mail connections with street cars at street crossings.

This clearly was not carrying the mails between the post-office and a railroad station, steamboat landing, or mail station, or between any or either of such designated places. It was not service of a kind in contemplation of either of the parties at the time of entering into the contract; it was not specified or referred to in either the advertisement for proposals, instructions to bidders, or contract; and it was neither new nor additional service of like kind with that referred to in either said advertisement, instructions, or contract; but was an entirely different kind and character of service, namely, transporting the mails between the post-office, the mail stations, and a street car railway line, at given points (street crossings) on its line of route where the cars stopped to receive and make deliveries of mail matter,—in short, an *extra* service, entirely outside of the contract.

The situation is well summed up in said dissenting opinion herein:

> "In previous cases it has been held that there is a difference 'in kind' between a 'mail station' and a 'receiving station.' The difference in kind between a street car and a post-office seems to me to be much more radical than the difference between a receiving station and a mail station. This system of carrying the mails on street cars did not exist when the contract was made; the claimant did not agree to meet street cars; he did not agree to meet street cars on time; he did not agree to wait for street cars behind time. The Postmaster General had no right to try this experiment in city mail transportation at the claimant's cost. As was said in a recent case, 'a new system of receiving stations' is not 'new or additional transfer or mail station service;' and 'extra service' is not new or additional service. For the one, the contractor can recover; the other must be performed without additional compensation (Union Transfer Co.'s case, *36 C. Cls. R., 216*)" (*R., 53*).

(c.)

THE DECISION BELOW IS IN CONFLICT WITH BOTH PRIOR AND SUBSEQUENT DECISIONS OF THAT COURT IN SIMILAR MAIL CONTRACT CASES.

In the dissenting opinion herein, to which reference has been above made, it is further stated:

> "I perceive nothing in the present case which justifies me in departing from the decision in the case of Otis, followed as it has been by similar decisions in successive cases" (*R., 53*).

That the Chief Justice was correct in so stating is apparent from a consideration of said decisions:

In the Otis case, (*20 C. Cls., 315*) it was held, that a contractor for wagon mail messenger service in the city of New York could not be required to take the mails beyond the city limits, (to the Pennsylvania Railroad depot at Jersey City,) under the guise of "new or additional mail messenger or transfer service." (*S. C. affirmed, 120 U. S., 115.*)

In the case of Knox, exr, (*30 id., 59*), the contractor for a wagon mail messenger, transfer, and mail station service in the city of Washington, (the contract containing the usual requirements for the performance, without additional compensation, of "all new or additional service,") was required to haul a large number of mail bags and sacks to and from a repair shop, the latter having been established by the Postmaster General, and by him officially designated a branch post-office, as "Station I."

It was held, that this service was neither new nor additional, in kind, to the service contemplated, and that officially designating the repair shop as a branch post-office did not make it one in fact; that the new and additional service contemplated by the contract is service between the post-offices and mail stations and railway stations, to neither of

which several classes does a repair shop belong. The claimant was, accordingly, adjudged to recover for said *extra* service.

In the case of Woolverton (*34 id., 247*) a mail contractor, under a similar wagon mail messenger, transfer, and mail station service, was required to make collections from "substations," such as are found in ordinary mercantile shops, and differing only from the ordinary lamp-post box in that the latter is "out of doors" whereas the former are placed "indoors," inside of the shops. His contract required, among other things, delivery of mail at a railroad station in Jersey City, but the postmaster compelled him to also carry local Jersey City mail; he was also required to carry empty and damaged mail bags to the repair shop in New York city; and he was further required to carry and transport from the Grand Central depot, in New York city, to the subtreasury building, in the same city, $20,000,000 in gold. He claimed compensation for each of said items of service, alleging the same to be "extra," and not embraced within his contract.

The court sustained his claim as to each of said items; and, in its opinion, again defined the legal distinction between the service properly required under such a mail contract, and that which is *extra*. It also points out that such a contract does not require the collection of mail matter from substations or street boxes.

In the case of the Union Transfer Co. (*36 id., 216*), under a like mail contract, the Postmaster General, during the term thereof, established some seventeen "receiving stations," where mail matter could be deposited for dispatch, and the contractor was required to collect and distribute the same therefrom. This service the court held to be *extra*, and thus stated:

> "Before and at the time of the making of the agreement the collection and distribution of mail and mail matter, as shown by the findings, was made by

> letter-carriers, and while the department had the right to establish branch offices, dependent upon the necessities of the service, it had no right to establish a new system and require the claimant to perform the service of collecting mail and distribution of mail matter as contradistinguished from the service of carrying mail and mail matter as incident to a branch office."

And, finally, in its latest decision touching the same question, the case of the Utah, Nevada, and California Stage Co. (*supra*), said court, in distinguishing between the two kinds of service, "new or additional" and "extra," thus expressed the same conclusion and doctrine:

> "It was service different in kind and character, because it was incidental and consequent to the introduction of a condition into the city postal service which had never been there before—the establishment of a new post-office system.
>
> * * * * * * *
>
> "Accordingly, it has also been held that the department might multiply the number of branch post-offices and stations and increase the wagon trips * * * but could not bring into the contract a new subject-matter and compel the contractor to render without compensation a service which he had not contracted to perform.
>
> "Thus, where the contractor had agreed to carry the mails from the general post-office in New York to the railroads in Jersey City, * * * he could not be required to carry them to the Jersey City post-office; and where he had agreed to carry them between the general post-office and the branch post-offices and stations in the city, * * * he could not be required to carry them to numerous newly devised substations of a different character, scattered about the city in apothecaries and cigar shops. In a word, the subject-matter of the contract was held to be the administrative system of the postal service in the city *as it existed when the contract was made*, with

such additions or abbreviations as might be expressly set forth in the contract.

* * * * * * *

"To hold otherwise would be to hold that this carefully prepared contract, with the elaborate specifications thereto annexed, might be reduced to three lines: 'The undersigned, in consideration of $—, 'covenants and agrees that during the next four years 'he will do whatever the Post-Office Department bids 'him.'"

It is utterly impossible to reconcile the decision below in this case with the prior as well subsequent decisions of the same court, to which full reference has now been made.

Under those decisions, the conclusion is irresistible that the service for which recovery is here asked was neither "new nor additional" to any service of the kind embraced in or contemplated by either of the three contracts; and that it was service required in pursuance of, and made necessary by, the establishment of a new (experimental) system of carrying the mails in cities, upon street cars, the same constituting, therefore, a new subject-matter.

Hence, under all of the decisions of the Court of Claims, (other than that here under review.) the services so required of and performed by the appellant contractor were *extra*, for which he is entitled to receive compensation.

The reasoning of the court below, in its majority opinion, in rejecting this claim of appellant is neither convincing nor sound.

As to the service so required in Boston, between the mailing room and basement of the general post-office and the West End Street Railway Company, on Water street, of the value, as found, of $274.55; it holds the same to have been properly required under the contract (*R., 51*).

As to the service so required in Brooklyn, between the general post-office, various of the mail stations, and divers stopping places of the Brooklyn Heights street railway, at

street crossings, of the value, as found, of $2,266.51; it likewise holds the service to have been properly required under the contract; and, furthermore, it finds and holds that, the Postmaster General having established a mail messenger service upon the street-car line, between certain of the terminal as well as intermediate points of the routes embraced in the contract, the contractor was thereby relieved of carrying the mails between such points, and that, inasmuch as he was thereafter only required to carry and deliver the mails to, and receive the same from, the street cars at each of said terminal and intermediate points, he was really benefited to the extent of the difference of mileage so saved in the actual distance of the haul required; and the court below proceeded to find the exact difference in such mileage; and thereby came to the conclusion that the imposition of this *extra* service upon the contractor was really a benefit (*R., 44, 51*).

As to the service so required in Omaha, between the general post-office and street cars, the court, also, found that the establishment of such mail route on a street-car line operated to reduce the mileage of haul required by the contract; and thus, to that extent, relieved and benefited the contractor; and that the service thus required, *i. e.*, meeting street cars, and making and receiving dispatches of mail, "was a mere substitution of another manner of performing "the same service contracted for and at an advantage to "the claimant, and was otherwise properly required under * * * the contract" (*R., 49*).

Having reached that conclusion, the lower court omitted and declined to find the value of the service between the general post-office and the street cars, so performed by the contractor, in Omaha; although it does refer to the bid made by the same contractor, under a subsequent advertisement for the decreased service, as well as the bid of the subsequent lowest bidder therefor—neither of which facts, it is submitted,

having any legal bearing upon this claim for extra service, nor the value thereof.

The fallacy of such reasoning and holding is most apparent, when taken in connection with the contract. That contract provided, in no uncertain terms, that the service therein stipulated and required might be increased, decreased, or extended, and new or additional service of a like kind put on *without change of pay*.

If defendant saw fit during the term of the contract to *decrease* the amount of service required, whether by the curtailment or partial discontinuance thereof or by adopting for a part of the service some other kind of a mail messenger—for example, a street railway line—that was its privilege, but as the contract expressly stipulated that such decrease in the amount of service required should not change or reduce the pay, the contractor was entitled to all benefits and profits, if any, which resulted from such *decrease* in the service.

The government imposed upon the contractor service of a totally different kind and character, which was clearly an *extra* service not embraced in either the advertisement or contract; and when he presents a claim for compensation for that extra service, he is met with the reply that the service was *decreased*, and the amount saved to him by such decrease will more than compensate for the extra service he was required to render.

In other words, defendant here seeks to use, as a set-off against a perfectly legal and valid claim for *extra* service rendered by the contractor, a supposed benefit and profit which resulted to him because of a *decrease* in the amount of service required of him, and to which benefit and profit the defendant has not a shadow of a claim.

It is submitted that any such contention is specious and cannot operate to deprive the contractor of the fair and reasonable value of the *extra* service so required of and rendered by him.

If the service so required was *extra*, (as it undoubtedly was,) it continued so to be, and appellant is entitled to be paid the value thereof, and it cannot be traded off or set up against any benefit or right that legitimately accrued to him under the contract; and it is unavailing to say that, because by performing this totally different kind of a service, (and for which he did not contract,) to meet the exigencies of a new kind, character, and system of mail messenger (street car line,) he was relieved and benefited in the matter of mileage haul required. To that benefit, he was entitled under his contract; and the Government has no right to use it as a set-off in payment, in whole or in part, of an *extra* service which it required appellant to perform, outside of his contract, and for which he is entitled to be paid.

The extent to which such illogical reasoning necessarily leads is well shown in this case: *first*, the contract service is, in part, changed, and the contractor is made to meet street cars at mere street intersections and crossings, and to deliver and receive dispatches of mail; and his claim for compensation for that service as an *extra* is disposed of, by holding that he was really benefited thereby, as the establishment of a mail route on the street cars relieved him of considerable mileage haul under his contract, namely, *decreased* the quantity and volume of contract service, and that the one offsets the other; and, *second*, because of the same *decrease* in quantity and volume of contract service, and because the contractor declined to submit to an abatement from his contract compensation, the Postmaster General proceeds to take away his contract, and when compensation is sought as to that item, he is met with the response that his contract service had become *decreased*, and that, therefore, the action was authorized by the contract.

If these contentions, either or both, be legally tenable and sound, it would appear that mail contracts are binding *only* upon the contractor; and that the language used in the

opinion of the court below in the Utah, Nevada and California Stage Co. case (*supra*) is here singularly applicable:

> "The undersigned, in consideration of $—, covenants and agrees that, during the next four years, he will do whatever the Post-Office Department bids him,"

without additional compensation, and reserving to the Postmaster General the right to terminate the contract at pleasure.

Without further prolonging the argument, it is submitted that the conclusion of the court below, in respect of each and every of the foregoing items of claim for *extra* service, is erroneous in law.

III.

THE JUDGMENT BELOW, DISMISSING THE PETITION OF APPELLANT, IS ERRONEOUS, AND SHOULD BE REVERSED.

From what has been above shown, it results that the action of the Postmaster General, in terminating and discontinuing the Boston and Brooklyn contracts, was without lawful authority or right, and constituted a breach of contract, for which the Government is answerable to appellant in, at least, the sum of $18,884.14, less a credit of $4,126.33, as found by the court below (finding IX, *R.*, *43*), the same representing the measure of recovery for the breach of the Boston contract: said court having omitted and declined to find any loss of profit or damage sustained by appellant by reason of the breach of the Brooklyn contract.

And appellant is, further, entitled to recover, as hereinabove shown, for the several items of *extra* service performed by him:

Service between the Back Bay (Boston) and Brookline post-offices.....	$462.50
Service in Boston, to and from the street cars.....	274.55
Service in Brooklyn, to and from the street cars..	2,266.51
	$3,003.56

And, finally, he is entitled to recover the reasonable value of the like service in Omaha, to and from street cars, but which the court below held to be "a mere substitution of another manner of performing the same service contracted for and at an advantage to the claimant," and, accordingly, omitted to make any finding in respect of the value thereof.

It is respectfully submitted that the judgment below should be *reversed*, and that the cause should be remanded with directions to enter judgment in favor of appellant in respect of the several items aforesaid, as well also for the value of said extra service under the Omaha contract, the latter to be found by said court.

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Attorney for Appellant.

WASHINGTON, D. C.,
November 23, 1904.